

[Waiver 1993-3]  
W-93-46A

**MEMORANDUM**

March 15, 1993

TO: Kermit Mohn, Chair  
Montgomery County Commission on People with Disabilities

FROM: Jay L. Cohen, Chair  
Montgomery County Ethics Commission

RE: Advisory Opinion and Waiver

On July 1, 1992, the Ethics Commission issued an Advisory Opinion and Waiver to the members of the Montgomery County Commission on People with Disabilities (CPD). In the July 1st Opinion and Waiver, the Ethics Commission stated in:

Part I. The ethics law does not prohibit a member of CPD who is a person with a disability from advocating a program that benefits the member along with other people with disabilities.

Part II. The ethics law prohibits a member of CPD, including an industry representative, from participating in a matter that involves a program under which the member's employer receives funds.<sup>1</sup> The Ethics Commission, however, granted a waiver to industry representatives of CPD to participate in matters involving programs under which the industry representative's employer receives funds subject to the following conditions:

- (a) The waiver only applies to members who were appointed to CPD as an industry representative;
- (b) The Chair of CPD must provide each member of the CPD with a current membership roster that indicates the capacity in which each member is appointed and must identify the organization with which the industry representative is affiliated;
- (c) The industry representative must not participate in a matter that involves a program under which the industry representative's employer receives or would receive funds as a sole source provider or participate in matters regarding a grant to the industry representative's employer.

Part III. The ethics law prohibits a member of CPD from participating in a matter that directly involves a business with which the CPD member has a fiduciary or economic relationship. The Ethics Commission declined to grant a class waiver to allow each member of CPD to participate in a matter that directly involves a business with which the member has a fiduciary or economic relationship.

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<sup>1</sup> An industry representative is a person who, under the statute creating a public body, is appointed to the body to represent a type of business that will be affected by that public body.

Part IV. Section 11B-52 prohibits a member of CPD from contracting with the County without first obtaining a waiver from the Ethics Commission.<sup>2</sup> The Ethics Commission reaffirmed an earlier opinion which concluded that members of a committee may contract with the County if they obtain a waiver from the Commission or resign prior to submitting a proposal to the County. The Ethics Commission declined to grant a class waiver to all members of CPD to contract in all cases with the County.

After issuing the July 1st Opinion and Waiver, the Ethics Commission responded to a similar request for advice and waiver from the Montgomery County Commission on Child Care (MCCCC).

After careful consideration of the matters raised in the original request from CPD and the request from MCCCC, the Ethics Commission replaces parts II and III of the July 1st Opinion and Waiver to CPD with the following:

**II–III. Participation in a matter that benefits a business in which a member of CPD has an economic or fiduciary interest.**

Section 19A-11(a)(1) prohibits a public employee from participating in a matter that affects a business in which the public employee has an economic interest.<sup>3</sup> In addition, Section 19A-11(a)(2)(A) prohibits a public employee from participating in a matter that involves, as a party, a business of which the public employee is an officer, director or employee. Accordingly, Section 19A-11 prohibits a public employee from participating in a matter if the matter affects the employee in a manner distinct from its effect on the public generally or involves as a party a business in which the member has an economic or fiduciary interest.<sup>4</sup> The Ethics Commission concludes, therefore, that it is not a conflict of interest for members of CPD to participate in a matter involving a program under which all qualified service providers to persons with disabilities may be eligible for a County contract or other benefit.<sup>5</sup>

The ethics law, however, does prohibit a member of CPD from participating in a matter involving a matter the member knows or reasonably should know directly benefits a business in which the member has an economic or fiduciary interest. A matter directly benefits a business if the business:

- (1) holds a County contract to perform services or provide goods under a program involved in the matter;

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<sup>2</sup> Unless otherwise indicated, section references are to the Montgomery County Code (1984).

<sup>3</sup> Section 19A-4(m) provides that a public employee includes any person appointed to a county commission whether or not the person is compensated for serving on the body. Section 19A-4(b) defines, for purposes of the ethics law, a business to include a non-profit entity such as an institute, trust, or foundation. Under Section 19A-11(c) an economic interest generally must exceed a value threshold of \$1,000.

<sup>4</sup> A fiduciary interest is created by holding a position of trust in a business. A position of trust includes being an officer or member of a governing body of a business. A fiduciary owes a high degree of loyalty to the business which the fiduciary serves.

<sup>5</sup> An example of a benefit available generally to service providers would be a voucher issued by the County to income eligible persons with disabilities to be used to purchase services from any service provider.

- (2) would receive a County contract to perform services or provide goods under a program involved in the matter as a sole source provider or as a grantee.

The CPD has requested a waiver to allow members of CPD to participate in a matter that directly benefits a business in which the member has an economic or fiduciary interest.

Section 19A-8 authorizes the Commission to grant a public employee or class of public employees a waiver from the prohibitions of Section 19A-11 if the Commission finds that:

- (1) The best interest of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.

In applying these criteria, the Commission makes the following findings:

1. The County law establishing the CPD creates more than a disinterested advisory committee; it creates an advocacy body. Section 27-51 envisions that all of the 25 voting members of CPD are either associated with organizations that provide services to or represent people with disabilities, are recipients of those services, or are parents of people with disabilities. Section 27-52 provides that the duties of CPD include recommending programs “to promote the well being of people with disabilities” and make recommendations “for the more effective delivery of services and programs to people with disabilities.” If some members of CPD are prohibited from participating in any manner, including the expression of views and conveying information, in matters involving programs which directly benefit a business in which the member has an economic or fiduciary interest, the intent of the law creating the CPD would, in part, be frustrated. Accordingly, the Commission finds that granting a waiver would be in the best interest of the County.

2. The Ethics Commission believes that participation of a member of CPD in a matter which directly benefits a business in which the member has an economic or fiduciary interest creates, under certain conditions, a minimal conflict of interest because:

- (a) The CPD does not make decisions regarding government funding of programs.
- (b) The CPD has 25 voting members who represent differing interests. This creates a “check and balance” system within CPD. For example, members who represent recipients of services will tend to check the interests of members who represent providers of services. Even among 9 voting

members who represent service providers, there may well be competition for scarce government resources.

- (c) The potential harm resulting from a conflict of interest would be further minimized if a waiver is conditioned on a requirement that a member must first disclose in an open meeting of CPD his or her relationship with the business in which the member has an economic or fiduciary interest. The disclosure should be made at each CPD meeting at which the matter is considered and prior to participating in the matter. This disclosure will enhance the "check and balance" mechanism built into the law creating the CPD.
- (d) Conditioning a waiver by limiting the participation of a CPD member to discussion of matters that directly benefit a business in which the member has an economic or fiduciary interest will further minimize any potential harm resulting from a conflict of interest.

3. There is no indication that granting a waiver in this matter will provide a member of CPD, including an industry representative, with an unfair advantage over other members of the public.

Accordingly, the Ethics Commission grants a waiver to members of CPD to participate in matters which directly benefit a business in which the member has an economic or fiduciary relationship, subject to the following conditions:

- (1) Before participating in a matter which may directly benefit a business in which the member has an economic or fiduciary interest, the member must disclose the interest publicly in each meeting of the CPD which considers the matter. This disclosure should be reflected in the minutes of CPD.
- (2) The member's participation under this waiver must be limited to discussion only; the member must not vote on the matter.

If you have any questions regarding this Revised Opinion and Waiver, please do not hesitate to contact the Commission.

[This is the 1992 original waiver which is amended by 1993-3.]

W-93-46

### **MEMORANDUM**

July 1, 1992

TO: Kermit Mohn, Chair  
Montgomery County Commission on People with Disabilities

Howard B. Jacobson, Legislative Liaison  
Montgomery County Commission on People with Disabilities

FROM: Jay L. Cohen, Chair [signed]  
Montgomery County Ethics Commission

RE: Advisory Opinion and Waiver

The Ethics Commission has reviewed your memorandum of April 22, 1992. On behalf of the members of the Montgomery County Commission on People with Disabilities (CPD), you have asked for advice concerning the applicability of the Montgomery County Public Ethics Law to the members of CPD and for appropriate waivers as necessary. The Ethics Commission has distilled the issues raised in your memorandum as follows:

1. Does the ethics law prohibit a member of CPD who is a person with a disability from advocating funding of a County program that would benefit that member? If the answer is yes, you ask the Commission to grant a waiver under the ethics law to allow a member who is a person with a disability to participate in CPD decisions concerning programs that may benefit the member.

2. Does the ethics law prohibit a member of CPD who represents an organization that provides services to persons with disabilities (an industry representative) from participating in CPD matters that deal with programs under which the organization that employs the industry representative receives County funds? If the answer is yes, you ask the Ethics Commission to grant a waiver under the ethics law to allow an industry representative to participate in CPD decisions involving programs under which the organization that employs the industry representative receives County funds.

3. Does the ethics law prohibit a member of CPD from participating in CPD matters that directly involve a business with which a member is affiliated as an employee, officer, director, trustee, or employee? If the answer is yes, you ask the Ethics Commission to grant a waiver under the ethics law to allow a member to participate in CPD decisions directly involving an organization with which the member has a fiduciary or economic relationship.

4. Does the ethics law prohibit a member of CPD from contracting with the County? If the answer is yes, you ask the Commission to grant a waiver under the ethics law to allow a member of CPD to contract with the County.

Section 27-51 creates the CPD and provides that the County Executive appoints 25 voting members subject to confirmation by the County Council.<sup>6</sup> Section 27-51 further provides that of the 25 voting members, 13 must be people with disabilities, 3

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<sup>6</sup> Unless otherwise indicated, section references are to the Montgomery County Code (1984).

must be parents of people with disabilities, and 9 must represent organizations and agencies that provide services or represent people with disabilities.

Section 27-52 sets forth the duties of CPD which include: (1) evaluating programs and services for people with disabilities; (2) review Federal, State and local legislation concerning people with disabilities; (3) recommend appropriate sources of funding for programs for people with disabilities; and (4) make budget recommendations concerning funding for services and programs for people with disabilities.

The basic conflict of interest rules in the ethics law are set out in Section 19A-11 which states:

- (a) . . . Unless permitted by a waiver, a public employee must not participate in:
  - (1) any matter that affects, in a manner distinct from its effect on the public generally, any:
    - (A) property in which the public employee holds an economic interest;
    - (B) business in which the public employee has an economic interest; or
    - (C) property or business in which a relative has an economic interest, if the public employee knows about the relative's interest;
  - (2) any matter if the public employee knows or reasonably should know that any party to the matter is:
    - (A) any business of which the public employee is an officer, director, trustee, partner, or employee;<sup>7</sup>

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**I. Does the ethics law prohibit a member of CPD who is a person with a disability from advocating funding of a County program that benefits the member?**

Section 19A-11(a)(1) prohibits a public employee from participating in a particular matter if the matter affects the public employee in a manner distinct from its effect on the public generally. Programs that benefit persons with a disability impact on significant numbers of individuals who the Commission notes do not choose to become a member of that class. Accordingly, the Commission concludes that advocating a program that benefits people with disabilities is participating in a matter that affects the public generally. Consequently, the Commission concludes that the ethics law does not

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<sup>7</sup>Section 19A-4(m) provides that a public employee includes any person appointed to a County commission whether or not the person is compensated for serving on the body.

prohibit a member of CPD who is a person with a disability from advocating a program that benefits that member along with other people with disabilities.

**II. Does the ethics law prohibit an industry representative from participating in CPD matters that deal with programs which benefit the business that employs the industry representative?**

Section 19A-11(a)(1) prohibits a public employee from participating in a matter that affects a business in which the public employee has an economic interest.<sup>8</sup> The Ethics Commission believes that a member of CPD who participates in a CPD matter involving a program under which the member's employer receives funds is participating in a matter that affects a business in which the member has an economic interest.<sup>9</sup> Accordingly, Section 19A-11(a)(1) prohibits a member of CPD, including an industry representative, from participating in a matter that involves a program under which the member's employer receives funds.

Section 19A-8 authorizes the Commission to grant a public employee or a class of public employees a waiver from the prohibitions of Section 19A-11 if the Commission finds that:

- “(1) The best interests of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.”

In applying these criteria to this issue, the Commission makes the following findings:

1. The County law establishing the CPD requires the appointment of 9 voting members who are industry representatives.<sup>10</sup> If an industry representative could not participate in discussions regarding programs under which the member's employer receives funds, the intent of the law creating the CPD would, in part, be frustrated. Accordingly, the Commission finds that granting a waiver would be in the best interest of the County.

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<sup>8</sup> Section 19A-4(b) defines, for purposes of the ethics law, a business as including a non-profit entity such as an institute, trust, or foundation.

<sup>9</sup> Section 19A-11(c) established certain thresholds below which a public employee is deemed not to have an economic interest. Generally, if a public employee has an economic stake of \$1,000 or more in a business, the public employee has an economic interest in that business. An economic interest does not include a fiduciary relationship that is created by holding an office of trust such as a director, trustee, or other officer in a business. Conflict of interests created by fiduciary relationships is discussed in Part III.

<sup>10</sup> The Commission notes that Section 19A-11(b)(3) exempts from certain conflict of interest rules a public employee who is appointed to a regulatory or licensing body under a statutory provision that persons subject to the jurisdiction of the body may be represented in appointments to the body. Since the CPD is not a regulatory or licensing body, this exception does not apply.

2. The CPD is an advisory body; it does not make final decisions regarding government action. The Commission also notes that there are 25 voting members from various backgrounds which tend to create a “check and balance” system within the CPD. Accordingly, the Ethics Commission believes that an industry representative who participates in a matter concerning a program under which that industry representative’s employer may, along with others, be receiving funds creates a minimal conflict of interest. Balanced against this, the Commission finds that the statute creating the CPD clearly intends that industry representatives participate in program evaluation and recommendations. Accordingly, the Commission finds that the importance to the County of an industry representative performing his or her duties on the CPD outweighs the actual or potential harm of a conflict of interest.

3. There is no indication that granting a waiver in this matter will provide an industry representative with an unfair advantage over other members of the public.

Accordingly, the Ethics Commission grants a waiver to the industry representatives of the CPD to participate in matters involving programs under which the industry representative’s employer receives funds, subject to the following conditions:

- (1) The waiver only applies to members who are appointed to CPD as an industry representative.
- (2) The Chair of CPD must provide each member of the CPD with a current membership roster that indicates the capacity in which each member was appointed; i.e., person with a disability; parent of a person with a disability; industry representative. The Chair must identify the organization with which the industry representative is affiliated.
- (3) The industry representative must not participate in a matter that involves a program under which the industry representative’s employer receives or would receive funds as a sole source provider or participate in discussions regarding a grant to the industry representative’s employer.

**III. Does the ethics law prohibit a member of CPD from participating in a matter that directly involves a business with which the member has a fiduciary or economic relationship?**

Section 19A-11(a)(1) prohibits a public employee from participating in a matter that affects a business in which the member has an economic interest. In addition, Section 19A-11(a)(2)(A) prohibits a public employee from participating in a matter that involves, as a party, a business of which the public employee is an officer, director, or employee. Accordingly, unless the Ethics Commission grants a waiver, a member of CPD may not participate in a matter that directly involves a business with which the CPD member has a fiduciary or economic relationship. An example of a matter in which a business is directly involved would be a program that results or would result in a sole source contract award or a grant to a specific business.



The Ethics Commission finds that it cannot apply the criteria under Section 19A-8 to grant a class waiver to all members of CPD to participate in every matter that directly involves a business with which the member has a fiduciary or economic relationship. Crucial factors such as the type of benefit that will flow to the affected business and the need of the particular member to participate in the deliberations of the CPD must be weighed on a case-by-case basis. Accordingly, the Commission declines to grant a class waiver to allow each member of CPD to participate in a matter that directly involves a business with which the member has a fiduciary or economic relationship.

**IV. Does the ethics law prohibit a member of CPD from contracting with the County?<sup>11</sup>**

Section 11B-52 provides that unless authorized by law or the Ethics Commission a person who transacts business with the County must not simultaneously employ a public employee. Section 11B-52 further provides that a “public employee” includes uncompensated members of County boards and commissions and “employ” includes self-employment. Accordingly, members of CPD may not contract with the County without first obtaining a waiver from the Ethics Commission.

The Ethics Commission finds that it cannot apply the criteria under Section 19A-8 to grant a class waiver to all members of the CPD to contract in all cases with the County. For example, the Commission must assess the need of the County to continue to receive both the services of the individual as a member of CPD and as a contractor for the County on a case-by-case basis.

With regard to granting waivers to a member of a County board or commission to contract with the County, the Ethics Commission has previously advised:

. . . members of a board, committee, or commission may contract with the County if they obtain a waiver from the Commission or resign prior to submitting a proposal to the County. Waivers have been granted if the member has not participated in a recommendation regarding the specific project in question. Generally, the member is thereafter disqualified from participating in any government action which affects the project in question. (Emphasis in original.)

The Commission trusts you will find this memorandum responsive to your inquiry. If you have further questions, please do not hesitate to contact the Commission.

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<sup>11</sup> You had also asked if the ethics law prohibits a member of CPD from receiving aid from the Department of Family Resources (DFR). Presumably, DFR administers programs that benefit people with disabilities. In Part I, the Commission concluded that a member of CPD who is a person with a disability may participate in a matter that involves a program that may benefit that member. By the same token, a member of CPD may receive benefits from a program administered by DFR if the member is eligible to participate in the program.